

E-FILED: 9/10/2007

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

PIOTR J. GARDIAS,

No. C04-04086 HRL

Plaintiff,

Consolidated With: C04-04768 HRL
C05-01242 HRL
C05-01833 HRL
C06-04695 HRL

v.

SAN JOSE STATE UNIVERSITY,

**ORDER DENYING PLAINTIFF'S
REQUEST TO DEEM "MOTION TO
CONSOLIDATE" TO BE AN AMENDED
COMPLAINT**

Defendant.

_____ /

Presently before the court is a dispute between the parties as to whether plaintiff's apparent dissatisfaction about how Chris Nordby obtained a position in defendant's Cogeneration Turbine Plant is or is not a claim properly raised in the instant consolidated action. (Plaintiff seems to believe that the job should have gone to himself.) Defendant reportedly has produced requested discovery pertaining to Nordby and a Cogeneration Turbine Plant position, but it maintains that the information is irrelevant because the issue was not alleged in any of plaintiff's complaints. Plaintiff disagrees and argues that his August 14, 2006 "Motion to Consolidate" (Case C04-04086, Docket No. 82) should now be deemed an amendment to his final (fifth) complaint. The court previously issued an order to show cause giving the parties an opportunity to brief the issue, and the matter was deemed submitted

1 without oral argument.

2 Upon consideration of the papers filed by the parties, this court issues the following
3 order.

4 Rule 15(a) of the Federal Rules of Civil Procedure governs motions for leave to amend
5 and provides that “leave shall be freely given when justice so requires.” FED.R.CIV.P. 15(a).
6 The decision whether to grant leave to amend under Rule 15(a) is committed to the sound
7 discretion of the trial court. *See Waits v. Weller*, 653 F.2d 1288, 1290 (9th Cir. 1981). Leave
8 need not be granted, however, where the amendment would cause the opposing party undue
9 prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue delay.
10 *Foman v. Davis*, 371 U.S. 178, 182 (1962).

11 In this case, the court concludes that there is no justification for plaintiff’s request to
12 retroactively deem his “Motion to Consolidate” – which was filed over one year ago – to be an
13 amended complaint. None of plaintiff’s complaints in this consolidated litigation provide notice
14 of any claims pertaining to Nordby and a Cogeneration Turbine Plant position. The only
15 mention of Nordby is a passing reference buried within the mass of letters and other documents
16 appended to plaintiff’s form complaint in Case C06-04695. However, defendant indicates that
17 those attachments apparently were filed only with the court and were not served with
18 defendant’s copy of the complaint in that case. In any event, even broadly construing that
19 complaint, the fleeting reference in the attachments to Nordby and the Cogeneration Turbine
20 Plant position is insufficient to provide notice of any claim for relief based upon the same.
21 (Indeed, it is not clear from the reference that plaintiff is even asserting a claim for relief, as
22 opposed to merely complaining about another instance of perceived unfair treatment by
23 defendant.)

24 Plaintiff seems to contend that his “Motion to Consolidate” may automatically be
25 deemed an amended pleading under Fed. R. Civ. P. 15(a). Here, he points out that the “Motion
26 to Consolidate” was filed before defendant answered the complaint in Case C06-04695. It is
27 true that a party “may amend [its] pleading once as a matter of course at any time before a
28 responsive pleading is served . . .” FED.R.CIV.P. 15(a). However, at the time plaintiff filed his

1 “Motion to Consolidate,” there was no indication that it was, or that plaintiff intended it to be,
 2 anything other than a request that Case C06-04695 be consolidated with his four earlier-filed
 3 lawsuits.¹ Moreover, while the “Motion to Consolidate” attaches several documents concerning
 4 a host of issues (including Nordby and the Cogeneration Turbine Plant), it does not provide
 5 proper notice of any claim for relief. It was not until after defendant answered the complaint,
 6 and after it raised relevance objections to his discovery requests, that plaintiff suddenly claimed
 7 that his “Motion to Consolidate” was really intended to be an amended pleading. Plaintiff’s
 8 (after-the-fact) pronouncement as to his “Motion to Consolidate” does not transform that
 9 document into an amendment of right under Fed. R. Civ. P. 15(a).

10 Further, it is not apparent that plaintiff exhausted his administrative remedies by raising
 11 his grievance about Nordby and the Cogeneration Turbine Plant position in EEOC Charge No.
 12 556-2006-00182 (the apparent basis of his complaint in Case No. C06-04695). EEOC charges
 13 are liberally construed; and, a federal court may consider allegations of discrimination which
 14 were not raised in an EEOC charge, but which nevertheless are like or reasonably related to the
 15 allegations contained in the charge. *See B.K.B v. Maui Police Dep’t*, 276 F.3d 1091, 1100 (9th
 16 Cir. 2002). Here, the basis of plaintiff’s claims is that he was essentially demoted and
 17 wrongfully denied promotions to specific and distinct positions (Campus Engineer and
 18 Associate Director) at San Jose State University. (*See* Complaint C06-04695). If plaintiff truly
 19 intended to assert a claim for relief as to the Cogeneration Turbine Plant position, he certainly
 20 knew how to do so.² There is no indication that plaintiff intended to include any claim as to
 21 Nordby and the Cogeneration Turbine Plant position in EEOC Charge No. 556-2006-00182
 22 before the EEOC concluded its investigation and issued a right-to-sue notice. Indeed, the
 23 attachments to his “Motion to Consolidate” indicate that he only attempted to have the EEOC
 24 examine various letters about Nordby months after the EEOC closed its files as to that charge.

26 ¹ Plaintiff has filed amendments as of right before (*see, e.g.*, plaintiff’s “First
 27 Amended Complaint,” Case No. C04-04086, Docket No. 7). If he really intended to do so
 here, he knew how to do so properly.

28 ² Each of the five complaints that comprise this consolidated action concern
 specifically identified positions which plaintiff claims should have been given to him.

1 For the foregoing reasons, plaintiff's request to retroactively deem his "Motion to
2 Consolidate" to be an amended pleading is denied. Plaintiff has not and may not state a claim
3 for relief with respect to Nordby and the Cogeneration Turbine Plant position.

4 IT IS SO ORDERED.

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6 Dated: September 10, 2007

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9 HOWARD R. LLOYD
10 UNITED STATES MAGISTRATE JUDGE
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A copy of this document will be mailed to:

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